

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 12, 2009

STATE OF TENNESSEE EX REL P.A.S. v. L.B., ET AL.

Appeal from the Chancery Court for Humphreys County
No. CH-05-056 George Sexton, Chancellor

No. M2008-00973-COA-R3-CV - Filed September 24, 2009

The State, representing the interests of the non-parent custodian of a minor child, filed suit against the Father of the child, seeking child support and medical insurance for the child. Father appeals the grant of custody to the child's step-grandmother, as well as the child support obligation set by the trial court. The State appeals the award of attorney's fees imposed as a sanction, as well as the calculation of retroactive child support. We affirm in part, reverse in part, and remand to the lower court for proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed in Part, Reversed in Part, and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P. J., M. S., not participating.

Clifford K. McGown, Waverly, Tennessee, for the appellant, L.B.

Robert E. Cooper, Jr., Attorney General and Reporter, and Warren A. Jasper, Senior Counsel, Nashville, for the appellee, the State of Tennessee.

Dan. R. Bradley and Lindsay C. Barrett, Dickson, Tennessee, for the appellee, P.A.S.

OPINION

I. BACKGROUND

On April 15, 2005, the State of Tennessee ("State"), initiated an action against L.B., the putative father of a minor child ("Father"), in Humphreys County Chancery Court on behalf of P.A.S. ("Grandmother"), the maternal step-grandmother of the child, to set support and to recover retroactive child support to the date of the child's birth. The child, born out of wedlock on October 13, 1992, began living with Grandmother when he was seven years old.

A proceeding against G.D.S. (“Mother”)¹ had been instituted in Humphreys County Juvenile Court on December 28, 2004 seeking to have the court set child support and to recover retroactive support to the date Grandmother assumed custody of the child. Mother was subsequently ordered to pay child support in the amount of \$72.69 per week beginning March 4, 2005.

Father filed an answer and counter-petition on August 8, 2005, seeking a DNA parentage test to “definitely establish his parentage” and seeking to be designated the primary residential parent of the child; he also filed a proposed parenting plan. Mother was listed as a “Third Party Defendant” in the caption of Father’s answer and counter-petition. The trial court ordered the parties to submit to a DNA test, which confirmed that Father was the biological father of the minor child.

On April 3, 2006, Father filed a motion, asking the court to adopt a temporary parenting plan; the motion was set for hearing on April 28. In the course of ruling on the motion, the trial court found that the State no longer represented Grandmother and, consequently, could not accept service of process on her behalf. The court entered an order assessing a sanction “in the form of attorney fees” in the amount of \$500.00 against the State to be paid to Father’s counsel, finding that the State had failed to forward copies of Father’s counter-complaint to Grandmother and for the State’s failure to notify Father’s counsel of its lack of attorney-client relationship with Grandmother.

On July 19, 2006, Grandmother, along with her husband, filed an answer to Father’s counter-petition and a third party petition, in which Mother also joined, requesting that Grandmother and the maternal grandfather be designated the primary residential parents. Grandmother subsequently filed a motion seeking to set current child support and a determination of support arrearage based on Father’s imputed income, to which Father responded, seeking to have support calculated based on his average reported income for tax years 1999-2006.

Prior to filing her answer and third party petition, Grandmother, through her separate counsel, moved to dismiss the Chancery Court proceeding in light of the pending Juvenile Court proceeding against Mother. An agreed order was entered on August 10, 2006, transferring the Juvenile Court proceeding to Humphreys County Chancery Court “so that all matters may take place with respect to the minor child ” in that court; an order was subsequently entered in Chancery Court, overruling the motion to dismiss in light of the transfer of the case from Juvenile Court.

Following a hearing, the trial court entered an order designating Grandmother and her husband as having “primary caregiver status” with reference to the child; declaring Father to be the child’s biological father and granting him specific visitation; setting child support to be paid by Father and Mother; and awarding Grandmother judgment against Father for back child support in the amount of \$24,552.00. The State was awarded \$5,505.00 for monies paid on behalf of the child.

Father appeals, raising the following issues:

1. Did the trial court err by placing legal and physical custody of the minor child with a non-parent/non-relative absent a prior finding of dependency and/or neglect?

¹ Mother was married at the time of proceedings in this case.

2. Did the trial court err in basing Father's child support obligation on an imputed income of \$36,700?

Grandmother asserts further issues as follows:

1. Whether the trial court was correct in ruling that Grandmother be awarded primary residential custody; and
2. Whether the trial court was correct in ruling that income be imputed on Father for the calculation of current and future support.

The State raises the following issues on appeal:

1. Whether sovereign immunity precludes a sanction of attorney's fees against the State;
2. Whether the State was improperly sanctioned pursuant to Tenn. R. Civ. P. 11; and
3. Whether retroactive child support was incorrectly calculated to the detriment of the State's right to be remunerated for benefits paid.

II. ANALYSIS

This case was tried without a jury. Thus, the trial court's findings of fact are reviewed *de novo* on the record with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are reviewed *de novo* without any presumption of correctness. Tenn. R. App. P. 13(d); *Biggs v. Reinsman Equestrian Prods., Inc.*, 169 S.W.3d 218, 221 (Tenn. Ct. App. 2004).

A. Custody

The Tennessee Constitution protects a natural parent's fundamental right to have the care, custody and control of his or her child. *See* Tenn. Const. Art. I, § 8; *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). "Through Article I, section 8 and its implicit recognition of parental privacy rights, our Constitution requires that courts deciding initial custody disputes give natural parents a presumption of 'superior parental rights' regarding the custody of their children." *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002).² This presumption recognizes that "parental rights are superior to the rights of others and continue without interruption unless a biological parent consents to relinquish them, abandons his or her child, or forfeits his or her parental rights by some conduct that substantially harms the child." *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). Thus, in cases between a parent and a non-parent, a parent cannot be deprived of the custody of his or her child unless there has been a finding of substantial harm to the child. *See In re Askew*, 993 S.W.2d 1, 4 (Tenn. 1999). Only then can a court evaluate the "best interest of the child" to determine custody. *See id.*

² A natural parent enjoys the presumption of superior rights when: (1) no order exists transferring custody from the natural parent; (2) the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) the order transferring custody from the natural parent is invalid on its face; and (4) the natural parent cedes only temporary and informal custody to the non-parents. *See Means v. Ashby*, 130 S.W.3d 48, 57 (Tenn. Ct. App. 2003).

This is an initial custody dispute as there have been no previous court orders regarding custody of the child and Father has not consented to relinquish his parental rights. The child has remained in Grandmother's continuous physical custody and care with Father's and Mother's knowledge and consent since he was seven years old. Upon the institution of this action, Father petitioned the trial court for custody and was subsequently declared the biological Father of the minor child.

In support of the decision to designate Grandmother as primary custodian of the child, the court made the following statement:

Well, [Father] may be truly sincere, but it raises a red flag with the Court when you have a child that is 15 now, almost 15 at the time [Father] got sued by the State of Tennessee for child support, and all of a sudden he wants custody. And that just raises a red flag with the Court. He's – the child's been with [Grandmother] since he was seven years old. The Court's of the opinion that's where the child wants to be. He's happy there. He's not go doing [sic] as well in school as he needs to and could do. He needs to quit dipping snuff, so does the Court.

But I'm going to make [Grandmother] the primary residential parent. . . .

We do not deprecate in any respect the concern expressed by the trial court; however, its rationale is insufficient, factually and legally, to overcome the presumption of superior parental rights afforded Father, as espoused in *Blair v. Badenhope, supra*. While Father did previously cede informal custody to Grandmother, there is nothing in the record to support the determination that Father does not retain his superior rights to custody as the child's natural parent.

As noted, Father testified as to efforts he made to visit the child and to provide support and that he "didn't think I had that right" to seek a declaration of paternity and custody or visitation until the instant suit was filed. According to the testimony of Father, Mother did not let him have contact with the child until he was approximately three years old. At that time, Father and Mother began living together; they did so for approximately two years. When Father and Mother parted ways, Mother did not allow Father to see the child. Father tried to support the child, but Mother would not accept the support. There is evidence that the child did not attend school regularly while residing with both Mother and Grandmother and that Grandmother's attempt to home school the child was unavailing; after being cited into Juvenile Court for school attendance, the child was ordered to attend public school. The record also shows that Father would visit the child at Grandmother's house and that, when the child was twelve years old, he began to call Father and would see Father regularly, especially around hunting season, but this visitation eventually tapered off.

Moreover, the trial court made no findings of substantial harm to the child if custody was placed with Father. Unless there has been such a finding, Father cannot be deprived of custody of his child. *In re Askew, supra*.³

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[I]n a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child

(continued...)

Accordingly, the lower court erred in designating Grandmother as primary residential parent.

B. Child Support

The trial court set Father's child support at \$527.00 per month, to be paid to Grandmother. Our determination that the trial court erred in naming Grandmother as primary residential parent necessitates a reversal of the court's order setting child support to be paid by Father, thereby pretermittting our consideration of the issues raised by Father and Grandmother relating to the computation of the child support obligation.

C. Retroactive Child Support

The trial court awarded Grandmother support retroactive to the date she assumed primary custody of the child; she has not appealed from that portion of the court's order. The State, however, contends that it was "shortchanged" in its efforts to recover benefits paid on behalf of the child inasmuch as the State's recovery is dependent upon the amount of support collected; consequently, to the extent retroactive support was reduced, the State asserts that it suffered a diminution in its recovery. The State requests that the matter "be remanded for calculation of retroactive support pursuant to the Guidelines so that the State's rights to portions of retroactive support owed significantly in excess of the \$5,505 awarded in the final order will be protected." In addition, in footnote one of its brief, the State asserts the following:

There may also be additional monies owed to the State of Tennessee not at issue in this appeal. The language of the order makes clear that the State of Tennessee is not precluded to seek payment for monies not heretofore paid by the State of Tennessee on behalf of the minor child and/or his mother. The total amount owed was not made a part of this record and is not at issue in this appeal. However, by appearing in this matter on behalf of the Department of Human Services, the Attorney General is not waiving any amounts in excess of \$5,505 which may be owed to the State of Tennessee in this matter.

We have reviewed the record in this case and are unable to determine the legal or factual basis upon which the State seeks recovery of benefits assertedly paid on behalf of the child and in what manner the court's action in awarding Grandmother retroactive child support benefits from the date the child came into her custody prejudiced any right the State asserts. The pleadings initiating both the Juvenile Court case involving Mother and the Chancery Court case involving Father were both filed by the State on behalf of Grandmother seek an order for the defendant to pay support and provide insurance, and seek an order that Grandmother receive retroactive support; there is no allegation that the State paid or was claiming any amounts paid on behalf of the child. The record further shows that

³(...continued)

unless there has been a finding, after notice required by due process, of substantial harm to the child.

In re Askew, 993 S.W.2d 1 at 4.

since the April 28, 2006, hearing Grandmother has proceeded with separate counsel and, since the entry of the date of the agreed order transferring the Juvenile Court case to Chancery Court, the State has not filed any pleading in the case. The State did not participate in the trial of this case held on November 2, 2007 or the hearing on February 29, 2008. There is no exhibit, pleading or other document in the record relating to any claim by the State and the brief filed by the State offers no assistance, despite the requirements of Rule 27(a)(6) and (7), Tenn. R. App. P.

The order from which this appeal is taken provides, in pertinent part:

IT IS FURTHER ORDERED that once all amounts are paid to Plaintiff, then the State of Tennessee shall be reimbursed for Five Thousand Five Hundred Five (\$5,505.00) Dollars heretofore paid by the State of Tennessee on behalf of the minor child, [].

None of the parties to this appeal challenge the court's action in making the award to the State. As stated, the State provides no information relating to monies it claims to be owed. On the record before us, we find that the trial court correctly applied Tenn. Comp. R. & Regs. 1240-2-4-.06 (1)(b)3 by granting Grandmother retroactive support back to the date the child came into her custody.⁴

D. Sanctions

In its order imposing a sanction of \$500.00 against the State, the trial court stated only:

Because of its failure to forward copies of the Defendant's Counter-Complaint to P.A.S. and G.S. and for its failure to notify Mr. McGown of its lack of attorney-client relationship the State is subject to sanctions in the form of attorney fees.

The State contends that the doctrine of sovereign immunity bars the imposition of sanctions in the form of attorney's fees against the State and that the court's action in awarding the sanction violates Tenn. R. Civ. P. 11's "safe harbor" provision. We agree that the trial court erred in imposing the \$500 sanction against the State.

Article I, § 17 of the Tennessee Constitution provides that suits may be brought against the State in such a manner and in such courts as the Legislature may by law direct. This provision has been interpreted as a grant of sovereign immunity to the State; thus, no suit against the State may be sustained

⁴ Tenn. Comp. R. & Regs. 1240-2-4-.06 (1)(b)3 states in pertinent part as follows:

(1) Unless the rebuttal provisions of Tennessee Code Annotated §§ 36-2-311(a)(11) or 36-5-101(e) have been established by clear and convincing evidence provided to the tribunal, then, in cases in which initial support is being set, a judgment must be entered to include an amount of monthly support due up to the date that an order for current support is entered:

...

(b) From the date:

...

3. Of physical custody of the child by a parent or non-parent caretaker.

absent express authorization from the Legislature. *See Coffman v. City of Pulaski*, 422 S.W.2d 429 (Tenn. 1967). Tenn. Code Ann. § 20-13-102(a)⁵ likewise prohibits courts from hearing cases against the State absent waiver. A waiver of sovereign immunity will not be found “unless there is a statute clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation.” *Davidson v. Lewis Bros. Bakery*, 227 S.W.3d 17, 19 (Tenn. 2007).

The authority of a court to sanction attorneys for their conduct is part of the court’s “inherent power to supervise and control their own proceedings.” *See Andrews v. Bible*, 812 S.W.2d 284, 291 (Tenn. 1991). Such power stems from the “province of the courts to set standards for the bar” and from the fact that an attorney “acts not only as a client’s representative, but also as an officer of the court.” *Id.* The sanction at issue here, however, was imposed against the State; consequently, the award was not authorized as a function of the court’s inherent power to sanction counsel’s pursuit of a matter in bad faith or counsel’s proceeding in a reckless manner.⁶

The State argues in its brief that “the order for payment of attorneys [fees] by the District Attorney’s Office is designed to reach the state’s treasury for satisfaction of the payment.” To the extent the State would have us conclude that sovereign immunity would bar such an award in all circumstances we respectfully disagree. At Tenn. Code Ann. § 36-5-101(l)(2) the Legislature has authorized an award of attorney’s fees against the State in a Title IV-D case when there is a clearly established violation of Tenn. R. Civ. P. 11 “or for other contemptuous or other sanctionable conduct.” *See also In re J.R.L.-D*, No. M2008-01921-COA-R3-JV, 2009 WL 1910922, at *3 (Tenn. Ct. App. July 1, 2009). Inasmuch as the trial court cited no statutory or other authority in making the award and in light of the fact that, as noted above, we are unable to determine the legal or factual basis upon which the State participated in this case, other than as counsel for Grandmother until she secured separate counsel, we cannot say that the trial court did not have statutory authority to award sanctions against the State.

We do, however, determine that, to the extent sanctions were imposed pursuant to Rule 11, Tenn. R. Civ. P., the procedure followed in this case was not in accordance with the Rule and, consequently, the award of attorney’s fees must be reversed. Where Rule 11 sanctions are initiated on the court’s own initiative, the provisions of Rule 11.03(1)(b) must be followed. There is nothing in the record to show that this was done.

⁵ Tenn. Code Ann. § 20-13-102(a) provides:

No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

⁶ There is also no indication that the sanction was imposed as a sanction for a finding of contempt of court or as a consequence of a violation of the rules governing discovery. *See, e.g.*, Rule 37, Tenn. R. Civ. P.

IV. CONCLUSION

For the foregoing reasons, the trial court's order designating Grandmother as primary residential parent and setting child support to be paid by Father is reversed and the case is remanded for entry of an order designating Father as primary residential parent and for consideration of the proposed parenting plan filed by Father. The assessment of the sanction of \$500.00 against the State is reversed. In all other respects, the order of the court is affirmed.

Costs of this cause are taxed to Appellee, P.A.S.

RICHARD H. DINKINS, JUDGE